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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1621

BYRON TIMOTHY LIGGETT, M.D. ..... *Appellant*

vs.

STATE OF KANSAS EX REL., CURT T. SCHNEIDER, ATTORNEY GENERAL OF THE STATE OF KANSAS, KANSAS HOSPITAL ASSOCIATION, THE KANSAS MEDICAL SOCIETY, THE KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN ..... *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF JURISDICTIONAL STATEMENT

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

Pursuant to Rule 42 of the Rules of this Court, the Association of American Physicians and Surgeons, Inc., respectfully moves this Court for leave to file a brief *amicus curiae* in support of the Jurisdictional Statement in the

above-entitled case. Counsel for movant has, as of the date the within motion and brief is filed, received consent from counsel for the Appellant for the filing of same.

In support of the motion of the Association of American Physicians and Surgeons, Inc., for leave to file a brief *amicus curiae,* the Association states that it is a voluntary association formed by private, practicing physicians and surgeons in 1943. The Association is incorporated as a non-stock, non-profit corporation under and by virtue of the laws of the State of Illinois, and has its principle offices located in Oak Brook, Illinois. It is the largest association with nationwide membership in the United States devoted exclusively to representing the physician in the practice of private medicine. The Association has members in every state and territory in the United States, and in the District of Columbia. One of the primary objectives of the Association in recent years has been the safeguarding of the private practitioner's "right" to engage in his or her calling free from such arbitrary controls as found in compulsory medical malpractice insurance legislation.

In Kentucky, members of the Association successfully overturned that Commonwealth's compulsory medical malpractice insurance statute. *McGuffey, etc., et. al. v. Hall, et. al.,* 557 *S.W.* 2d 401 (Ky., 1977). The disposition of the Supreme Court of Kentucky has enabled the Association and its members to appeal to courts and state legislative assemblies that, in terms of a state's "police powers," the frontiers of legal thinking have been advanced. Though not discussed in the opinion of the Supreme Court of the State of Kansas hereinbelow, the case of *McGuffey, etc., et. al. vs. Hall, et. al.,* supra, was vigorously argued.

The accompanying brief *amicus curiae* espouses a fundamental philosophy of the Association and its

individual members, and presents an argument unique to the instant case. Of importance to the Association is the argument that a conflict does exist within the jurisdictions as to the Constitutionality of compulsory medical malpractice insurance legislation, and that a standard is necessary by which the several jurisdictions may be guided.

The Association, additionally, presents the argument, based upon the Fourteenth Amendment, that compulsory medical malpractice insurance legislation, such as K.S.A. 1976 Supp. 40-3042, is violative of the State's "powers of police," and, its compulsory nature bears no "reasonable relationship" to the purpose therefor. Upon the aforementioned arguments the Association of American Physicians and Surgeons, Inc., and its members prevailed in *McGuffey, etc., et. al., v. Hall, et. al.,* supra.

The accompanying brief *amicus curiae* in support of the Jurisdictional Statement presents a diverse perspective not presently represented which will assist in obtaining full consideration of issues critical to all segments of the public.

CONCLUSION

For the above-stated reasons, the Association of American Physicians and Surgeons, Inc., respectfully urges this Honorable Court to grant this motion for leave to file the accompanying brief *amicus curiae* in support of the jurisdictional statement.

Respectfully submitted,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

MAY IT PLEASE THE COURT:

This brief *amicus curiae* in support of the Jurisdictional Statement is filed by the Association of American Physicians and Surgeons, Inc., by Motion, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.

The Association of American Physicians and Surgeons,

Inc., a non-stock, non-profit corporation, was organized for the purposes of protecting and safeguarding the "right" of the practitioner of private medicine to engage in such a calling free from arbitrary and unreasonable controls. The Association has been active as an *amicus* or a party in such cases as *State of North Carolina Ex Rel Sarah T. Morrow, etc., et. al. v. Califano,* No. 76-0049-Civ-5 (E.D.N.C., Sept. 22, 1977), *affm'd.* *U.S.* (April 17, 1978) and *Association of American Physicians and Surgeons, Inc., et. al., v. Weinberger,* 395 *F. Supp.* 125 (D.C. Ill., 1975), *affm'd.* 423 *U.S.* 975 (1976). Importantly, the Association and its members successfully challenged the Kentucky Compulsory Medical Malpractice Insurance Statute in 1977. *McGuffey, etc., et. al., v. Hall, et. al.,* 557 *S.W.* 2d 401 (Ky., 1977). The Association firmly believes that the interpretation of the Supreme Court of Kentucky in *McGuffey* and that of the Supreme Court of the State of Kansas in the instant case as to considerations of the "police power" of the State and rationality and relationship of the compulsory nature of the legislation to the purpose or purposes for which it was enacted are irreconcileable. Hence, the Association, being highly active in this particular field, and having advanced the law in the field as a result of *McGuffey, etc., et. a., v. Hall, et. al.,* supra., has a deep interest in the case at bar. The background of the Association and other interests are detailed in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Association submits to this Honorable Court that a substantial federal question exists with respect to the instant case, and, that a conflict exists within several jurisdictions as to the application of considerations embodied in the Fourteenth Amendment to the Constitution of the United

States and their relation to compulsory medical malpractice insurance legislation.

The Association firmly believes that the Fourteenth Amendment does not admit of an interpretation so expansive as to permit a State, under the guise of the "power of police" to require a private, practicing physician to purchase medical malpractice insurance or forfeit his or her license to practice or freedom to practice medicine. Simply, it should be of no concern to the State to guarantee that anyone who might file a negligence action against a practitioner of private medicine will find a deep pocket. Whereas, the Association readily admits that a State may and should, in the interest of protecting its citizens from unhealthy conditions or actual harm, regulate certain aspects of the practice of medicine just as certain aspects of the practice of law are also regulated, nevertheless, the outlines for the regulation by the State of both the practice of medicine and law have been well defined, and cannot include a requirement that the practitioner purchase a policy of insurance as a condition of his or her continued practice.

A policy of insurance does not guarantee competence. It does not increase the availability of medical care, but, rather, restricts such availability. And, importantly, what if the amount of premium a physician (or lawyer or other professional) must pay eventually equals or exceeds the total coverage? Is there then a dollar figure one may attach to the Fourteenth Amendment before it must be invoked? The Association submits that this Honorable Court has addressed the question of the extent of a State's "power of police" over the professions a number of times, and given the States very clear and unequivocal standards. The Association respectfully urges that a substantial federal question exists, and that jurisdiction be noted. The "police

power" of the State cannot be extended as far as the State of Kansas has so attempted in K.S.A. 1976 Supp. 40-3402 (a).

Compulsory medical malpractice insurance is inherently unreasonable. To prevent an otherwise competent and capable professional man or woman from engaging in a lawful calling on account of his or her failure to secure an insurance policy is to delegate to the insurance industry an authority over the health, safety and welfare of the citizens of a State heretofore unknown by any private institution or person.

The Supreme Court of Kentucky relied upon the foregoing logic. *McGuffey, etc., et. al., v. Hall, et. al.*, supra. The Association submits that unless jurisdiction is noted, and, on the merits, the Supreme Court of the State of Kansas is reversed, a serious spiral may well begin which would undermine that necessary independence of the professions; result in the delegation to private institutions or persons of unprecedented authority, and, at the expense of that traditional and necessary limited State regulation, open the professions to manipulation and domination, economically and otherwise, by vested, financial interests.

What public good is served by guaranteeing a market for liability insurance carriers? What public good is served by a physician in private practice (or lawyer, or other professional person) being forced to close his or her office because insurance premiums have equalled the amount of coverage? What public good is served by guaranteeing a "deep pocket" to all litigants? What showing is there that physicians and surgeons in the State of Kansas or elsewhere are historically responsible for failing to pay claims against them, whether or not they are insured? The Association submits that there has been and could be no such showing. And, finally, how does such a requirement contribute to any reduction in the cost of medical care?

Compulsory medical malpractice insurance, simply, is an arbitrary and abusive exercise of power. The Fourteenth Amendment, and the precedents established thereunder by this Honorable Court, clearly, make such legislation unlawful.

A substantial federal question exists. The jurisdictions are in conflict. Jurisdiction must be noted in order that this Honorable Court might reaffirm its long-standing position with respect to the "power of police" of a State over the professions.

ARGUMENT

I

A DECISION BY THIS COURT WOULD ESTABLISH VALUABLE PRECEDENT AND RESOLVE A CLEAR CONFLICT AMONG THE JURISDICTIONS

In three States medical malpractice insurance legislation requiring the purchase of such insurance subject to loss of one's license or loss of one's practice has been questioned constitutionally, and, ultimately reached State Supreme Courts.[1] Hawaii, which enacted a statute not unlike that challenged here and the statute successfully challenged in Kentucky, repealed its medical malpractice insurance legislation.

There have been challenges filed against similar legislation in Pennsylvania, Oregon, Illinois and North Dakota. Where decisions have been reached by Courts of original jurisdiction, they are as diverse in their conclusions as those published opinions heretofore mentioned.

Likewise, to the detriment of the practice of private

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[1]Idaho, *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P. 2d 399 (1976), cert. den. 431 U.S. 914 (1976); Kentucky, *McGuffey, etc., et. al. v. Hall*, et. al., 557 S.W. 2d 401 (Ky., 1977); and the instant case.

medicine, health care institutions, which receive vast amounts of public monies, are requiring physicians to purchase medical malpractice insurance as a condition to acquiring or maintaining staff privileges. In response thereto State and federal courts, after determining the requisite "State action," have rendered varied and diverse opinions.[2]

The Association submits that an air of confusion exists within the medical community which must be resolved. That resolution must reaffirm those simple guidelines established by this Honorable Court in *Dent v. West Virginia,* 129 *U.S.* 114 (1889) and *Watson v. Maryland,* 218 *U.S.* 173 (1910). The fundamental standards which the Association urges this Honorable Court to reaffirm were well recognized in the decision of the Supreme Court of Kentucky. The Court stated:

> We therefore hold, as did the trial court, that the provision for compulsory malpractice insurance has not been shown to be justified as an exercise of the police power, in the absence of which any interference with the natural right of any individual or group to pursue a legitimate business or profession is a violation of [the Constitution][3]

McGuffey, etc., et. al., v. Hall, et. al., supra, at 414.

The conflict must be resolved, and that resolution must weigh in favor of the fundamental "natural right" which one enjoys to practice a lawful and honorable profession.

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[2] California, *Rosner v. Peninsula Hospital District,* 224 *Cal. App.* 2d 115, 36 *Cal. Rptr.* 332 (1964); Louisiana, *Pollock v. Methodist Hospital,* 392 *F. Supp.* 393 (E.D. La., 1975) (note question of judgment *in solido* peculiar to civil law); Arizona, *Holmes v. Hoemako Hospital,* 573 P. 2d 477 (1978).

[3] The aforementioned holding was based upon sections 1(5) and 2 of the Kentucky Constitution. It is important to note, however, that the aforementioned Kentucky Constitutional prohibitions relate to the use of "absolute and arbitrary power over the lives, liberties and property of freemen. . ." The law developed under the Fourteenth Amendment is not inapposite.

McGuffey, etc., et. al., v. Hall, supra, at 414, and *Holmes v. Hoemako Hospital,* supra, at 479 [the right to follow any lawful vocation or profession is constitutionally protected, c.f., *Meyer v. Nebraska,* 262 *U.S.* 390 (1923)].

A substantial federal question exists. Jurisdiction must be noted. The decision below dealt with an important Fourteenth Amendment question in a fashion which has raised doubts in other jurisdictions. The Association respectfully suggests that summarily to affirm that decision could well inhibit the careful and orderly development of extraordinarily significant constitutional principals. *Colorado Springs Amusements, Ltd. v. Rizzo,* 428 *U.S.* 913 (Opinion of Mr. Justice Brennan) (1976); Note, "Summary Disposition of Supreme Court of Appeals," 52 *B.U.L. Rev.* 373 (1972).

II

K.S.A. 1976 SUPP. 40-3402(a) IS REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A.

K.S.A. 1976 SUPP. 40-3402(a) EXTENDS BEYOND THE SCOPE OF THE "POLICE POWER" OF THE STATE OF KANSAS

The use of the term "police power" was, originally, derived from the Opinion of Mr. Chief Justice John Marshall in *Gibbons v. Ogden,* 9 Wheat. (22 *U.S.*) 1 (1824). Again, and with greater emphasis, the term "police power" emerged in Marshall's Opinion in *Brown v. Maryland,* 12 Wheat. (25 *U.S.*) 419 (1827)[4]

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4 Some Constitutional law scholars regard *Brown v. Maryland,* supra., as the beginning of the use of the term "police power." R. Roettinger, *The Supreme Court and State Police Power* (1957) at 10.

The classic definition of "police power" was delivered by Mr. Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. (61 Mass.) 53 (1851) at 85. Mr. Chief Justice Shaw stated:

> The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, *not repugnant to the constitution*, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. (Emphasis added).

Early in the judicial history of the United States, the "police power" was discussed, largely, in response to the State and National governments' respective control over commerce.[5] Mr. Chief Justice Roger B. Taney defined "police power" as the

> . . . power of sovereignty, the power to govern men and things *within the limits of [the State's]* dominion. It is by virtue of this power that [the State] legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, *except insofar as it has been restricted by the Constitution of the United States*. (Emphasis added)

Pierce v. New Hampshire [The License Cases], 5 How. (46 *U.S.*) 504 (1846) at 583.

In the last half of the nineteenth century a formula, after voluminous legislation began to take shape identifying the nature of the State's "police power". The formula generally appears to be as follows: that a law purported to be enacted for the protection of the public will not be declared invalid, unless it shall be made clear to the Court that it was not open to the State legislature to find that it

[5] See *Gibbons v. Ogden*, supra.; *Brown v. Maryland*, supra.; and *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. (53 U.S.) 299 (1851).

had a real or substantial relation to the protection of the public health, safety, morals or welfare, or unless it is so clearly arbitrary or oppressive, or (as Mr. Justice Oliver W. Holmes, Jr., stated) "so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions." *Muller v. Oregon*, 208 *U.S.* 412 (1908). See also: *German Alliance Ins. Co. v. Kansas*, 233 *U.S.* 389 (1914); *Broadnax v. Missouri*, 219 *U.S.* 285 (1911); *Chicago, etc., R.R. v. Mc Quire*, 219 *U.S.* 549 (1911); Swayze, "Judicial Construction of the Fourteenth Amendment," 26 *Harv. L. Rev.* 1 (1912); Bird, "The Evolution of Due Process of Law in Decisions of the United States Supreme Court," 13 *Col. L. Rev.* 37 (1913); and, Warren, *The Supreme Court in United States History*, Vol. II (Boston, 1926) at 745.

Every exercise of "police power" is subject to fundamental Fourteenth Amendment requirements of being reasonable, and of not being arbitrary. *Reynolds v. La. Bd. of Alcoholic Beverage Control*, 249 *La.* 127, 185 *So.* 2d 794 (1965), *cert. den.* 385 *U.S.* 946 (1966); *Mutual Loan Co. v. Martell*, 222 *U.S.* 225 (1911); *Chicago, B & Q Ry. v. Illinois*, 200 *U.S.* 561 (1906).

A State's "police power" has, most frequently, been described as ". . . extending to making regulations promotive of domestic order, morals, health and safety." *Hannibal & St. J. R. Co. v. Husun*, 95 *U.S.* 465 (1877). The power embraces the "protection of lives, health, and property of citizens, the maintenance of good order, and the preservation of good morals." *Patterson v. Kentucky*, 97 *U.S.* 501 (1878).

The "police power," the Association submits, is, fundamentally, a "protective" device. It "protects" or "extends to the protection of lives, limbs, health, comfort and quiet of all persons, and protection of all property within the State." *Slaughter House Cases*, 83 *U.S.* 16

(1872). However, such power is strongly qualified. Stated this Honorable Court in *Munn v. Illinois,* 94 *U.S.* 77 (1876) at 83-84:

> "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private. . . but it does authorize the establishment of laws requiring each citizen to conduct himself, and so use his property as not unnecessarily to injure another.

Again, the "police power" is a "protective" device. And, that "protection" will be deemed constitutional only if it does not interfere with some right which is purely and exclusively private. *Munn v. Illinois,* supra. A State's "police power" can be properly exercised only when there is a reasonable relationship to the public health, safety, morals or welfare. *West Coast Hotel Co. v. Parrish,* 300 *U.S.* 379 (1937); *Van Oster v. Kansas,* 272 *U.S.* 465 (1926).

If, in a given act of a State legislature, there is no benefit flowing to the public from the enforcement of said act, and that act restricts a fundamental right or individual freedom, the limits of the "police power" have been passed and the act must fall. *Fairmont Creamery Co. v. Minnesota,* 274 *U.S.* 1 (1927) *Atkins vs. Kansas,* 191 *U.S.* 207 (1903); Comment, 67 *Mich. L. Rev.* 360, 362 (1968). Certainly, if the Court can locate no relationships between the act in question and the public health, safety, morals or welfare, the act is unconstitutional. *Griswold v. Connecticut,* 381 *U.S.* 479 (1965); *Pierce v. Society of Sisters,* 268 *U.S.* 510 (1925); *Meyer v. Nebraska,* 262 *U.S.* 390 (1923).

The practice of medicine has always been one area of endeavor which States have deemed within their power to

regulate. Insofar as the practice of medicine affects the health and safety of the citizens of the State, it has been held to be an area of public concern, and such regulation is consistent with the Fourteenth Amendment. *Watson v. Maryland,* supra; and *Polhemus v. American Medical Ass'n.,* 146 *F. 2d* 357 (9th Cir., 1944).

The regulation of the practice of medicine, like all exercises of "police power", is not without limits. This Honorable Court established general outlines for the regulation of the practice of medicine in *Watson v. Maryland,* supra., at 176:

> It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people,and requiring for its successful practice general education and technical skill, as well good character, it is obviously one of those vocations which may be regulated to see that only properly qualified persons shall undertake its responsible and difficult duties. *To this end* many States of the union have enacted statutes which require the practitioner of medicine to submit to an examination by a competent board of physicians and surgeons, and to receive duly authenticated certificates showing that they are deemed to possess the necessary qualifications of learning, skill and character essential to their calling. (Emphasis added.)

A State's "police power" over the private practice of medicine, thus, must be directed to insuring that practitioners are properly educated and of good moral character; that medical schools maintain proper

standards;[6] that physicians maintain proper standards of conduct; and, that they conform to certain fundamental standards of ethics, i.e., avoidance of advertising (except where it my be deemed protected by the First Amendment), solicitation and unlawful criminal behavior. *Barsky v. Board of Regents of the University of the State of New York,* 347 *U.S.* 442 (1954).

To force one to purchase a policy of medical malpractice insurance or prohibit that individual, who, otherwise, is wholly competent in his or her field, from engaging in the practice of medicine simply does not fit within the aforementioned standards. In fact, the requirement borders on the ludicrous.

The State has no legitimate interest in guaranteeing that physicians (or any other professionals) will pay all civil claims. Such a scheme, as found in K.S.A. 1976 Supp. 40-3402 (a) cannot be justified on account of a shortage of insurance carriers in Kansas or the high cost of medical liability insurance premiums, for, requiring physicians to purchase such insurance does nothing to make insurance more readily available or less expensive.

As in the practice of law, a state can require high standards for qualification such as good moral character and proficiency before one may be licensed or otherwise enabled to practice, but those standards must have a reasonable and rational connection with the individual's competence and capacity to practice.
See: *Douglas v. Noble,* 261 *U.S.* 165 (1923) *Dent v. West Virginia,* supra.; *Watson v. Maryland,* supra.; *Nebbia v. New York,* 291 *U.S.* 502, 89 *ALR* 1469 (1934).

This Honorable Court must note jurisdiction, for K.S.A. 1976 Supp. 40-3402(a) cannot stand constitutional muster.

[6] See: *New Jersey Chiropractice Ass'n. v. State Board of Medical Examiners of N.J.,* 79 *F. Supp.* 327 (D.C.N.J., 1948).

B.

THE REQUIREMENTS OF PURCHASE OF MINIMUM AMOUNTS OF MEDICAL MALPRACTICE INSURANCE AS A CONDITION OF THE CONTINUED PRACTICE OF MEDICINE IS UNREASONABLE AND IRRATIONAL

For a State statute to make the purchase of an insurance policy a condition of a physician's "right" to practice medicine is unreasonable and irrational. Certainly, Fourteenth Amendment questions have always been scrutinized under the test of reasonableness and rationality of the given law. *Bibb v. Navajo Freight Lines,* 359 *U.S.* 520 (1959); *Triegle v. Acme Homestead Ass'n.,* 297 *U.S.* 189, 101 *ALR* 1284 (1936); *Nebbia v. New York,* supra.; *Standard Oil Co. v. City of Marysville,* 279 *U.S.* 582 (1929).

Reasonableness of any legislation must be found by examining whether those who must bear the regulation and surrender a liberty are one and the same as those whose actions created the problem sought to be corrected. For any State, conceptually, to enact legislation within its "police power", there must be a force within that State's jurisdiction which is or will adversely affect the general public, or certain individuals. If such a force, be it incompetent individuals practicing medicine or some business fraud, exists, that State may impose the proper remedy, even if it be destructive of an entire business enterprise. However, any limitation or penalty, to be valid within the dictates of the Fourteenth Amendment to the Constitution of the United States, must be exercised *against that which would be harmful, or has been doing harm to the public.* See: *Nebbia v. New York,* supra., at 510; *Breard v. City of Alexandria,* 341 *U.S.* 622 (1951).

The act in question, K.S.A. 1976 Supp. 40-3402 (a), simply cannot pass the test of reasonableness. The State of

Kansas, in enacting the statute, did not refer to physicians as being inherently negligent or historically negligent. There is no policy consideration which referred to physicians as being economically or financially irresponsible, or historically incapable or unwilling to meet judgments rendered against them in civil cases. Yet, under K.S.A. 1976 Supp. 40-3402 (a), the physicians are those whose liberties are surrendered, not the authors of the wrong sought to be remedied. Presumably, K.S.A. 1976 Supp. 40-3402 (a) was enacted to resolve the so-called "crisis" in medical malpractice insurance which briefly swept across the nation.

How is the general public served here? If a physician, such as the Appellant, fails to comply by purchasing an insurance policy, he or she will be prohibited from practicing medicine. Such would occur even if the physician involved was the only practitioner in a small, isolated, rural community, or, the most heralded neuro-surgeon in the area. How would requiring either of those persons to purchase an insurance policy or forcing them out of the practice of medicine best serve the general public? If there are or were "victims" of the so-called "crisis" in medical malpractice insurance, those victims are or were the physicians themselves. Yet, because of a situation over which they have no control and, thus, cannot correct, they stand in a position to forefeit their very livelihood.

To rationally and responsibly correct the so-called "malpractice crisis," the State must correct the source of the wrong whatever or whomever it might be. To exercise power to limit the rights or liberties of others, most of all the victims of the wrong, is abusive, irrational, irresponsible and wholly beyond the necessities of the case. *Muller v. Oregon,* supra. See also: *Davidson v. New Orleans,* 96 *U.S.* 97 (1878) and *Yick Wo v. Hopkins* 118 *U.S.* 356 (1886).

The very unreasonableness of the scheme may be found in the fact that the statute threatens a physician who may be the most highly competent vascular or neuro surgeon with loss of ability to practice medicine if he or she fails to purchase insurance. Even if that physician has never had a civil lawsuit filed against him or her, it would make no difference.

Who in society is being protected under K.S.A. 1976 Supp. 40-3402(a). Most likely, only the insurer, and those civil claimants who would want a "deep pocket" guaranteed.

This Honorable Court must, the Association urges, note jurisdiction, and reverse the decision of the Supreme Court of the State of Kansas.

C.

K.S.A. 1976 SUPP. 40-3402(a) IS REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT AMOUNTS TO A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It has long been established in the law that an individual's pursuit of a lawful occupation is "property" within the meaning of the Fourteenth Amendment. *Louis K. Liggett Co. v. Baldridge,* 278 *U.S.* 105 (1928). Insofar as physicians are concerned, their profession embodies a variety of rights of a very fundamental nature which arise out of their relationship with their patients. The physician, therefore, has a commanding reason, constitutionally, to practice the profession free from arbitrary interference. An attorney of law is in a similar position.

Speaking of the practice of medicine being a "property" right, Mr. Justice Hugo L. Black, dissenting in *Barsky v. Board of Regents of the University of the State of*

New York, supra., stated, at 459:

> I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is. . . a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution.

The right to pursue a lawful occupation free of unreasonable restraints and infringement was given its greatest security in *Meyer v. Nebraska*, 262 *U.S.* 390 (1923), wherein the Court Stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed (by the Due Process Clause of the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life. . . and generally to enjoy those privileges long recognized at common law essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, supra., at 399. See also: *Dent v. West Virginia*, 129 *U.S.* 114 (1889).

The Supreme Court of the United States has said repeatedly that "Where certain 'fundamental rights' are involved. . . regulation limiting those rights may be justified only by a 'compelling state interest'. . . and. . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 *U.S.* 113, 155 (1973). In addition, the legislative enactment or regulation must be "reasonable" and not arbitrary or capricious. *Mutual Loan Co. v. Martell*, supra., and *Chicago, Burlington & Quincy Ry. v. Illinois*, supra.

There simply is no reasonable or rational basis for the State to threaten to deny, or, in fact, deny a physician or lawyer or other professional person from practicing his or her calling on account of the refusal to purchase malpractice insurance. There is no cogent reason for leaving the professions at the mercy of an industry which could, potentially, price them into oblivion. Likewise, there is no cogent reason for placing such an infringement upon the property of the physician since he or she, alone or in conjunction with others, cannot correct the wrongs sought by the Legislature to be corrected.

Unequivocally, private property is not held at the "mercy of the legislature." *Munn v. Illinois*, supra. Legislation "must have limits or the 'contract' and 'due process' clauses are gone." *Pennsylvania Coal Co. v. Mahon*, 260 *U.S.* 393 (1922). "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, supra.

To require a physician to purchase medical malpractice insurance or forego the practice of medicine exceeds the State's "power of police," and is a "taking," a denial of property, without due process of law.

This Honorable Court must note jurisdiction, and reverse the Supreme Court of the State of Kansas.

CONCLUSION

For all the foregoing reasons, the Association of American Physicians and Surgeons, Inc., as *Amicus Curiae*, and in the interest of private, practicing physicians, respectfully requests this Court to note jurisdiction and declare K.S.A. 1976 Supp. 40-3402(a) unconstitutional.

Respectfully submitted,

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